

# An Introduction to the Law of Contract

Sixth Edition

**Stephen Graw**



# **An Introduction to the Law of Contract**

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# **An Introduction to the Law of Contract**

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Sixth Edition

Lawbook Co. 2008



Published in Sydney by

Thomson Lawbook Co.

100 Harris Street, Pyrmont, NSW

First edition .....1990

Second edition .....1993

Third edition .....1998

Fourth edition .....2002

Fifth edition .....2005

National Library of Australia

Cataloguing-in-Publication entry

Graw, Stephen.

An Introduction to the Law of Contract.

6th ed.

Includes index.

ISBN 978 0 455 22494 7

Contracts—Australia

346.9402

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Lawbook Co.

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Managing Editor: Lara Weeks

Product Developer: Natasha Naude

Publisher: Robert Wilson

Typeset in New Aster, 9.5 on 12 point, by Midland Typesetters, Australia

Printed by Ligare Pty Ltd, Riverwood, NSW

To

*Dale, Genevieve and James*





# Preface

There have been few significant changes to the law of contract since the last edition was completed at the end of 2004. Most of the changes that have occurred have been clarifications of how existing principles apply in particular instances – but there have been some important cases and they, together with the few statutory amendments that have been made, are all covered in this edition.

Probably the most important of the cases were those High Court, Federal Court and state court decisions, starting with *Pacific Carriers Ltd v BNP Paribas*, that confirmed both the importance of the parties' objectively determined contractual intention when deciding whether particular matters have become terms of the contract and the fact that the courts will take into account not only the text of the agreement but also all the surrounding circumstances, as they were known to the parties, as well as the purpose and object of the transaction – so that extrinsic evidence can now be used to interpret even apparently unambiguous contracts (as the Full Federal Court held in *Lion Nathan v Coopers Brewery*).

Other important decisions included *Khoury v Khouri* and *Faraday v Rappaport* (both confirming that a simple payment of money, by itself, is not a sufficient act of part performance to circumvent the *Statute of Frauds*' writing requirements), *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* and *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (both confirming the normally binding effect of signature), *Mitchell v Valherie* (giving an expanded view on when statements in advertising will be regarded as puff instead of as terms or actionable misrepresentations), *Martech v Energy World* (posting a salutary warning about the non-enforceability of gratuitous promises, even in commercial settings, for those to whom they are directed), *Proform Sports v Proactive Sports* (highlighting the continuing problems of contracting with minors, again, even in a commercial context), *Dalton v Ellis* (on the use of trusts as a means of circumventing the privity rule), *Pacific Brands v Underworks* (on the rules governing assignment of contractual rights), *Koompahtoo Local Aboriginal Council v Sanpine Pty Limited* (where the High Court for the first time expressly accepted that the concept of intermediate – or innominate – terms is part of the law of Australia), the UK decision in *Halpern v Halpern (No 2)* (raising the possible need for counter-restitution as a prerequisite to relief for duress) and *Beil v Mansell (No 2)*



(dealing with the circumstances in which, and the principles on which, deposits are legally forfeitable. Also noted in the Appendix is the first decision on the effect of the *Spam Act 2003* (Cth), *Australian Communications and Media Authority v Clarity1 Pty Ltd*, a case highlighting the seriousness with which the obligations imposed by that Act are regarded.

There is also a new section on “disgorgement damages”, which, while not yet awarded in Australia, have been awarded in the United States and have been raised as a possible remedy for appropriate breaches of contract in the United Kingdom.

Statutory changes since 2004 have also been minor but amendments to the monetary jurisdictions of the various state and territory courts are noted in Chapter 1. Also noted are the changes to the *Trade Practices Act*’s unconscionable conduct provisions and the effects, as relevant, of the *Civil Law (Property) Act 2006* (ACT).

As with previous editions, this edition does not pretend to be a complete statement of the law. Instead, it is, and is intended to be, an overview both of the relevant principles and of how they have applied (and continue to apply), in practice. For that reason, considerable emphasis continues to be placed on what I hope are readily understandable explanations supported by short summaries of those cases (seminal, pivotal or just quirky), that established, clarified or illustrate the principles that form what we know as the law of contract.

For that reason, I have also taken the opportunity not only to include new cases and statutory material but also to revisit and expand on some of the existing passages and to add new illustrations from established authorities where that improved understandability, readability or both.

The completed work owes a lot to many people—to those whose comments and suggestions have shaped many of the changes, to the staff at Lawbook Co, particularly Natasha Naude and Lara Weeks, and, most of all, to my wife Dale who, once again, assisted throughout in the researching and writing of this edition. To all of them I convey my heartfelt thanks. The law as stated is as I understand it to be on 1 March 2008 and any errors are, of course, all my own work.

STEPHEN GRAW

*Townsville*

*March 2008*



# Acknowledgments

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- s 3: [7.13]

**Sale of Goods Act 1972**

- s 7: [7.3.3], [7.3.13], [7.8.5]
- s 11: [11.3.2]
- s 13(2): [4.4.3]
- s 32(5): [15.2.11]

**QUEENSLAND**

**Commercial Arbitration Act 1990**

- s 53: [14.5.3]
- s 55: [14.5.3]

**Electronic Transactions (Queensland) Act 2001:** [A.2.2]

- s 8: [A.2.2]
- s 25: [A.10.2]

**Fair Trading Act 1989**

- s 38(1): [12.11]
- s 39: [13.12.3]
- s 50: [13.4.7]
- ss 52-53: [A.5.2]
- s 99(1): [12.11]
- s 100: [12.11]



**QUEENSLAND – continued**

Gaming Act 1850: [14.5.1]

Land Act 1910: [16.9.4]

Law Reform Act 1995  
     s 5: [16.4.11]  
     s 10(1): [16.4.11]  
     s 17: [7.2.1]  
     s 18: [7.13]

Limitation of Actions Act 1974:  
     [15.6.6]

Property Law Act 1974: [2.2.2]  
     s 45(2): [2.2.6]  
     s 55: [8.2.3], [8.2.4]  
     s 55(6): [8.2.3]  
     s 56: [2.2.2]  
     s 59: [2.2.2]  
     s 62: [15.2.15]  
     s 199: [8.2.4]

Racecourses Act 1923: [14.5.1]

Sale of Goods Act 1896  
     s 5: [7.3.3], [7.3.13], [7.8.5]  
     s 9: [11.3.2]  
     s 11(2): [4.4.3]  
     s 31(4): [15.2.11]  
     s 53: [16.9.3]

**SOUTH AUSTRALIA**

Age of Majority (Reduction) Act  
     1971  
     s 3: [7.2.1]

Commercial Arbitration Act 1986  
     s 53: [14.5.3]  
     s 55: [14.5.3]

Electronic Transactions Act 2000:  
     [A.2.2]  
     s 7: [A.2.2]  
     s 13: [A.10.1]

Fair Trading Act 1987: [12.12]  
     s 56(1): [12.11]  
     s 57: [13.12.3]  
     s 69: [13.4.7]

ss 72-73: [A.5.2]  
     s 84(1): [12.11]  
     s 85: [12.11]

Frustrated Contracts Act 1988:  
     [15.4.11]  
     s 7: [15.4.11]

Law of Property Act 1936: [2.2.2]  
     s 15: [8.2.4]  
     s 16: [15.2.15]  
     s 26: [2.2.2]  
     s 41(5): [2.2.6]  
     s 92: [7.13]

Law Reform (Contributory  
     Negligence and Apportionment  
     of Liability) Act 2001  
     s 3: [16.4.11]  
     s 7(2): [16.4.11]

Limitation of Actions Act 1936:  
     [15.6.6]

Minors Contracts (Miscellaneous  
     Provisions) Act 1979: [7.7.3]  
     s 4: [7.6.6], [7.7.3]  
     s 5: [7.7.3]  
     s 6: [7.7.3]  
     s 7: [7.7.3]  
     s 8: [7.7.3]

Misrepresentation Act 1972: [12.12]  
     s 6(1)(b): [12.8.6]  
     s 7: [12.7.8]

Sale of Goods Act 1895  
     s 2: [7.3.3], [7.3.13], [7.8.5]  
     s 6: [11.3.2]  
     s 8(2): [4.4.3]  
     s 29(4): [15.2.11]  
     s 51: [16.9.3]

**TASMANIA**

Age of Majority Act 1973  
     s 3: [7.2.1]

Commercial Arbitration Act 1986  
     s 53: [14.5.3]  
     s 55: [14.5.3]

Conveyancing and Law of Property

Act 1884: [2.2.2]  
s 36: [2.2.2]  
s 63(5): [2.2.6]  
s 86: [8.2.4]

Electronic Transactions Act 2000:

[A.2.2]  
s 5: [A.2.2]  
s 11: [A.10.2]

Fair Trading Act 1990

s 14(1): [12.11]  
s 15: [13.12.3]  
s 26: [13.4.7]  
s 37(1): [12.11]  
s 41: [12.11]

Limitation Act 1974: [15.6.6]

Married Women's Property Act 1935

s 3: [7.13]

Mercantile Law Act 1935: [2.2.2]

s 6: [2.2.2]

Sale of Goods Act 1896

s 7: [7.3.3], [7.3.13], [7.8.5]  
s 9: [2.2.2]  
s 11: [11.3.2]  
s 13(2): [4.4.3]  
s 34(4): [15.2.11]  
s 56: [16.9.3]

Supreme Court Civil Procedure Act 1932

s 11(7): [15.2.15]

Unordered Goods and Services Act 1973

ss 4-7: [A.5.2]

Wrongs Act 1954

s 2: [16.4.11]  
s 4: [16.4.11]

**VICTORIA**

Age of Majority Act 1977

s 3: [7.2.1]

Commercial Arbitration Act

1984

s 53: [14.5.3]  
s 55: [14.5.3]

Electronic Transactions (Victoria)

Act 2000: [A.2.2]  
s 7: [A.2.2]  
s 13: [A.10.1]

Fair Trading Act 1999

Pt 2B: [13.12.5], [13.13]  
s 8: [13.12.3]  
s 9: [12.11]  
s 21: [13.4.7]  
ss 24-26: [A.5.2]  
ss 32U-32XD: [13.12.5]  
s 32W: [13.12.5]  
s 32X: [13.12.5]  
s 32Y(1): [13.12.5]  
s 32Y(3): [13.12.5]  
s 158: [12.11]  
s 159(1): [12.11]  
s 320A(1): [12.8.6]

Frustrated Contracts Act 1959:  
[15.4.11]

Goods Act 1958

s 7: [7.3.3], [7.3.13], [7.8.5]  
s 11: [11.3.2]  
s 12(2): [4.4.3]  
s 36(4): [15.2.11]  
s 58: [16.9.3]

Instruments Act 1958: [2.2.2]

s 126: [2.2.2]  
s 126(1): [2.2.2]

Limitation of Actions Act 1958:  
[15.6.6]

Marriage Act 1958

s 156: [7.13]

Property Law Act 1958

s 41: [15.2.15]  
s 73A: [2.2.6]  
s 134: [8.2.4]



**VICTORIA** – *continued*

## Supreme Court Act 1986

s 49: [7.3.11]

s 50: [7.3.12], [7.6.6]

s 51: [7.6.6]

## Wrongs Act 1958

s 25: [16.4.11]

s 26: [16.4.11]

**WESTERN AUSTRALIA**

## Age of Majority Act 1972

s 5: [7.2.1]

## Commercial Arbitration Act 1985

s 53: [14.5.3]

s 55: [14.5.3]

## Electronic Transactions Act 2003:

[A.2.2]

s 7: [A.2.2]

s 13: [A.10.2]

## Fair Trading Act 1987

s 10(1): [12.11]

s 11: [13.12.3]

s 23: [13.4.7]

ss 29-31: [A.5.3]

s 77: [12.11]

s 79(1): [12.11]

Law Reform (Contributory  
Negligence and Tortfeasors'  
Contribution) Act 1947

s 3A: [16.4.11]

s 4: [16.4.11]

Law Reform (Miscellaneous  
Provisions) Act 1941

s 3: [7.13]

Law Reform (Statute of Frauds) Act  
1962: [2.2.2]

s 2: [2.2.2]

## Limitation Act 1935: [15.6.6]

## Pearling Act 1912: [7.10.1]

## Property Law Act 1969

s 9(4): [2.2.6]

s 11: [8.2.3], [8.2.4]

s 11(2): [8.2.3]

s 20: [8.2.4]

s 21: [15.2.15]

## Residential Tenancies Act 1987

s 42(1): [8.2.3]

## Sale of Goods Act 1895

s 2: [7.3.3], [7.3.13], [7.8.5]

s 4: [2.2.2]

s 6: [11.3.2]

s 8(2): [4.4.3]

s 29(4): [15.2.11]

s 51: [16.9.3]

**JAMAICA**

## Moneylending Law

s 8: [15.3.6]

**IMPERIAL**

## Australian Constitutions Act

(No 1) 1842: [1.2.1]

## Australian Courts Act 1828: [1.2.1]

## Commonwealth of Australia

Constitution Act 1900: [1.6.1],

[12.10.4]

s 51(xx): [12.10.4]

s 71: [1.10.6]

s 109: [1.6.2]

s 122: [1.6.2]

## Judicature Act 1893: [1.4.5]

## Reform Act 1832: [1.5.2]

**INTERNATIONAL**

## UNCITRAL Model Law on

Electronic Commerce 1996:

[A.2.2]

**NEW ZEALAND**

Contracts (Privity) Act 1982: [8.2.3]

**UGANDA**

Rent Restriction Ordinance 1949:  
[14.4.2]

**UNITED KINGDOM**

Contracts (Rights of Third Parties)  
Act 1999: [8.2.3]

Copyright Act 1956  
s 8: [6.2.7]

Customs and Inland Revenue Act  
1888: [14.2.4]

Defence of the Realm Regulations:  
[14.2.2]

Judicature Act 1873: [1.4.5]

Merchant Shipping (Safety and  
Load Line Conventions) Act  
1932: [14.2.8]

National Minimum Wage Act 1998:  
[5.1.2]

Pharmacy and Poisons Act 1933:  
[3.4.2]

Protection of Birds Act 1954: [3.4.1]

Road Traffic Act 1960: [14.2.7]

Rent Restriction Act 1920: [11.3.5]

Rent Restriction Act 1923: [11.3.5]

Restriction of Offensive Weapons  
Act 1959: [3.4.2]

Road Traffic Act 1960: [14.2.7]

Sale of Goods Act 1893: [10.4.2]  
s 4: [15.3.6]  
s 14: [9.1.6]

Solicitors' Practice Act 1974  
s 31: [14.4.2]

Solicitors' Practice Rules 1990:  
[14.4.2]

Statute of Frauds 1677: [2.2.2],  
[2.2.3], [2.2.4], [2.2.5], [14.2.1]  
s 4: [2.2.2]

Statute of Frauds Amendment Act  
1828 (Lord Tenterden's Act):  
[7.6.6]

Statute of Limitations: [6.6.3]